



LAW

The Statute of Limitations and Legal Remedies for Adults Abused as Children

—by Mark J. Horwitz and Josephine A. Bulkley

Introduction

Sexual abuse of children is associated with serious short-term and long-term psychological effects.¹ When maltreatment of a child is reported to authorities, criminal prosecution, juvenile court intervention, or civil lawsuits may be initiated. Many children, however, do not disclose the abuse,² and for various reasons, an official report or legal action does not occur. In response to this delay in disclosure, since the mid-1980's, many courts and legislatures have re-examined the statutes of limitations which apply to child sexual abuse legal actions

Many advocates for sexually abused children, adults with a history of childhood sexual abuse, therapists, and lawyers assert that a rigid application of traditional statutes of limitations often prohibits the legal system from holding childhood sexual abuse perpetrators responsible for their abusive acts. These critics have encouraged policy makers to suspend or expand limitations periods so that child sexual abuse legal actions can be brought against the perpetrators of abuse many years after the abuse has occurred.

This movement has elicited a negative reaction from a variety of sources (including defense attorneys, insurance companies, accused persons and their families, memory experts, and others).

They reason that the dangers inherent in suspending or expanding the limitations periods outweigh any gains. This article examines the rationale for altering statutory periods in these cases, considers how these periods have been altered in jurisdictions which have chosen to do so, and analyzes the ramifications of these alterations.

Child sexual abuse and statutes of limitations

Civil lawsuits or criminal prosecution may be initiated when the alleged victim is beyond the age of majority (juvenile court action occurs to protect minors). A civil suit (sometimes called a "tort" action for negligence, assault or intentional infliction of mental distress) may be brought by the victim seeking financial compensation from the alleged offender for harms which resulted from the abuse. Criminal proceedings are brought against the defendant by the state prosecuting attorney under child sexual offense criminal statutes. Either proceeding can provide a sense of vindication to a victim who prevails in court.

Most states have legislation establishing statutes of limitations for various civil and criminal actions. Statutes of limitations place a limit on the time within which court actions can be initiated. This time limit is intended both to protect potential

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NEWS

Second National Colloquium A Major Success; APSAC's Growth Continues

—by Theresa Reid

Second National Colloquium outperforms the First

Five hundred seventy-five professionals registered for APSAC's Second National Colloquium, a 10% increase over registration for the First National Colloquium. With faculty, distinguished guests, and volunteers, more than 650 people attended the expanded three-day Colloquium, held in Boston May 4-7.

"Field Day" added

Like its first, APSAC's Second National Colloquium focused on intensive, in-depth training for advanced professionals from all disciplines. This year, however, APSAC enhanced the program with a "Field Day"—a day-long forum in which professionals from all over the country presented their latest work. The day began with a plenary session in which current controversies in the field were aired. Lucy Berliner articulated therapists' dilemmas in relation to their legal obligations and

liabilities, David Finkelhor probed the data about the benefits and risks of prevention programs, and Richard Gelles argued provocatively against the prevailing orthodoxy about family reunification.

After the plenary session, participants had the rest of the day to attend dozens of presentations made by their colleagues in the field. Many of these were oral presentations in a workshop format; others were made in the more visual medium of the poster presentation, giving presenters and viewers the opportunity for extended dialogue. The day ended with a reception in the poster area, so everyone would have the opportunity to view posters while their authors were present; the night ended with a dance party which was attended by many Colloquium participants.

Interdisciplinary, international attendance

Professionals came from 48 states to attend the

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Statutes of limitations are designed to ensure admission of accurate and reliable evidence and to discourage manipulative litigants, all by placing a limit on the time within which court actions can be initiated.

defendants and to preserve the integrity of legal proceedings. Trial evidence can become increasingly unreliable with the passage of time, and unreliable evidence compromises the integrity of legal proceedings. A lack of time limits can also encourage manipulative tactics on the part of litigants, who might attempt needlessly to delay proceedings in an effort to force a weaker party to capitulate to their demands. Statutes of limitations are designed to ensure admission of accurate and reliable evidence and to discourage manipulative litigants, all by placing a limit on the time within which court actions can be initiated.

Court actions only may be initiated within the time period established by a statute of limitations. This is referred to as the period during which the statute runs. Sometimes the statutory period begins to run when the act in question, i.e. the abuse, occurs. In other situations the statutory time period "tolls" (is put on hold or suspended), until a secondary act occurs.

While courts value the prompt initiation of legal actions, timely actions might not be possible where child sexual abuse has occurred. Victims might be threatened not to disclose abusive incidents, or a victim's dependence on a perpetrator might inhibit the reporting of abuse. In each of these scenarios abuse could go unreported for a period of time greater than that allowed by the statutory limitations period. Subsequent criminal or civil legal actions, then, could not be initiated even after the inhibiting effects of coercion and dependence had passed.

Civil and criminal actions also could be delayed when the harms caused by child sexual abuse are not apparent until many years after the abuse has occurred. This could happen when a psychological problem related to the abuse does not develop for many years (i.e., sexual difficulties), is not recognized as being related to the abuse (i.e., an eating disorder), or when the abuse simply is not remembered until many years after it occurred.

Rigid interpretation of statutes of limitations prohibits criminal or civil proceedings despite legitimate reasons for not bringing such actions earlier. As discussed below, state legislatures and courts have created exceptions to such rigid applications of the limitations period in various areas of law. The following

sections discuss how courts and legislatures have analogized child sexual abuse to other areas of law to allow legal remedies many years later.

Child sexual abuse survivors reason that the delayed discovery rule should be invoked when they either do not know of the harms caused by the abuse, or have no memory of the abuse until after the statute of limitations expired.

Civil Cases

Courts traditionally have invoked the delayed discovery rule in civil negligence suits when not to do so would result in inequity or unfairness. The delayed discovery rule commonly is used in cases involving construction defects and medical malpractice. The faulty installation of a pipe, for example, located behind an internal wall in a home, might not become apparent until the pipe malfunctions, perhaps many years after installation. While the applicable statute of limitations relating to this construction defect may have been one year, the fact that the pipe was hidden caused the discovery of the defect to be delayed. Since the defect could not be discovered until the pipe malfunctioned, the statute of limitations might toll until the defect is in fact discovered. Another classic example where courts have suspended the statute of limitations involves a sponge left in a patient's stomach during an operation that does not result in injury until years later.

Similarly, child sexual abuse survivors reason that the delayed discovery rule should be invoked when they either do not know of the harms caused by the abuse, or have no memory of the abuse until after the statute of limitations expired. Most courts have refused to apply the delayed discovery rule when a victim always remembered the abuse but did not know until after the limitations period had expired that the abuse had caused a specific psychological harm.³ Many courts, however, have applied this rule to permit a civil action when a previously repressed memory of abuse is remembered by a survivor.⁴ On the other hand, some courts have held that the delayed discovery rule does not apply even in repressed memory cases, reasoning that these claims are overly subjective and present courts with stale, unreliable evidence.⁵

Courts also might use the delayed discovery rule to toll the statute of limitations in civil proceedings under the doctrine of constructive concealment or fraud. This doctrine can be invoked to ensure that a defendant who attempts to hide a harmful act does not benefit from the concealment. Thus, when a child was threatened not to tell by a teacher, one court held that the child's delayed disclosure was caused by the defendant's threats, a form of fraud or concealment.⁶ Or, a child might be misled to believe that a sexually abusive act is a "normal" occurrence between parent and child, and therefore the limitations period could be tolled until the child understands that the abuse was not "normal" (typically before the age of majority).

In addition, more than one-third of state legislatures have altered their statutes of limitations in child sexual abuse civil proceedings.⁷ In all states, the statute of limitations in any civil action tolls until the age of majority. This means that the period of time allowed to file a civil action, usually one year,

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does not begin to run until the child reaches the age of majority, on the theory that a person should not lose the right to bring a legal action until they have reached this age of responsibility.

In child sexual abuse cases, some states have extended the length of the statutory period (as in Idaho) for five years from the age of majority.⁸ Nine (9) states have allowed a civil action to be initiated within a certain number of years either after a child reaches the age of majority, or after the person discovers the injury was caused by sexual abuse.⁹ And when legislatures disapprove of court rulings, they can enact statutes which establish new law. For example, after a Washington court in *Tyson v. Tyson*¹⁰ decided that repressed memories could not form the basis for tolling the statute of limitations, the state legislature passed a statute which allows such actions.

Criminal cases

Courts also apply the doctrines of concealment or continuing crimes to extend the statutes of limitations in criminal cases. The doctrine of concealment allows a court to calculate a limitations period beginning not when the crime is completed but rather from the moment that efforts to conceal the crime have ceased. While the Nevada Supreme Court has permitted tolling for the period when a defendant concealed a pornographic film¹¹, other courts have not been willing to apply this doctrine to child sexual abuse cases. Under the continuing crimes doctrine, the crime is not completed, and hence the limitations period does not begin to run, until any coercion designed to inhibit a child from disclosing the abuse has ceased.

Many state legislatures also have changed their statutes of limitation for crimes against children, child abuse or child sexual offenses. Some simply have no statute of limitations for serious felonies, while 37 states have altered the time periods specifically in child sexual abuse cases.¹² The methods used to achieve these alterations include eliminating all

time limits, extending the length of the period, and tolling the period until the child either reaches the age of majority, notifies a law enforcement agency that the abuse occurred, or ceases to be dependent on the perpetrator of the abuse.¹³

Pros and cons of delayed legal actions

There are both advantages and disadvantages to bringing these actions many years later. Sexual abuse survivors might benefit psychologically by being able to confront their abusers in the formal setting of a civil or criminal courtroom. Sexual abuse survivors who prevail in civil suits may derive a sense of vindication and validation when society, through the vehicle of judge or jury, decrees that

they were unreasonably violated and are entitled to compensation. Monetary damages can be used to pay for necessary treatment, and any punitive damages might provide a further sense that a wrong has been committed against them. Adult survivors also may feel vindicated in seeing a perpetrator convicted and sentenced. Even if defendants prevail, some survivors still might feel a sense of empowerment or control by calling on the defendant to explain his actions, or benefit from the "secret" finally being exposed and the allegations made public.

But the potential negative psychological consequences to the victim inherent in an adversarial legal system, including being subjected to depositions, cross-examination and testifying in open court, must be considered by any sexual abuse survivor choosing to pursue a legal remedy. In addition, these cases may be very difficult to prove, due to lack of witnesses or other evidence, and faded memories. The negative emotional effects of bringing accusations and then having a judge or jury find for the defendant cannot be underestimated. Moreover, the financial costs to the victim of bringing civil suits may deter many survivors.

These court actions might also have broader social effects. Criminal and civil sanctions taken against child sexual offenders may deter the offender from sexually abusing others, as well as discourage other perpetrators from future acts of childhood sexual abuse. Other adults who were abused as children may feel a sense of satisfaction in knowing that increasing numbers of sexual offenders are being held accountable by the courts. On the other hand, if substantial numbers of these actions are decided in the defendant's favor, it may have a chilling effect on survivors bringing such actions, and even may inhibit disclosure of their childhood abuse or prevent psychological treatment.

Statutes of limitations primarily function to preserve the integrity of court proceedings by ensuring the reliability of evidence. As noted earlier, however, states already have extended the statutory period in civil matters until the age of majority, and some have eliminated a statute of limitations for serious crimes.¹⁴ Thus, the law in some states recognizes that the need for timely proceedings is not sacred and can give way when justice demands.

Extending the statute of limitations in child sexual abuse cases makes more sense when the issues are similar to other areas of law in which exceptions have been created. For example, when a criminal conceals a crime by threatening the victim not to disclose the criminal act, child abuse victims should benefit from a tolling of the statutory period as would any other crime victim. Or, when harm from the abusive act does not become apparent

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until many years after the abuse occurred, again there are precedents in other types of cases for preserving a civil remedy for these plaintiffs.

A more complicated question is posed by the issue of whether statutes of limitations should be extended to preserve a legal remedy for survivors of sexual abuse whose sole reason for not pursuing a timely legal remedy was amnesia or repression of memories which only recently have been recovered. Criminal prosecutions or civil actions based on delayed memories has led to a controversy concerning the veracity or accuracy of these memories, and the popular press has been inundated with analyses of the repressed memory phenomenon.¹⁵

Both the popular press and recent professional articles reflect growing concern that overzealous psychotherapists "create" memories of abuse in clients who were never abused. Psychotherapists might at times explore a client's history in ways which either overly influence the client or confuse psychic and actual reality. Mental health professionals and researchers on both sides of this issue seem to agree that it is difficult to distinguish a true from false memory, and that more research is needed.¹⁶ Exacerbating the situation are stories in the press and lawsuits involving alleged victims who have recanted, claiming that their memories were created by suggestive therapeutic techniques and are in fact false.¹⁷

On the other hand, recent studies indicate that the phenomenon of amnesia regarding a memory of a traumatic abuse experience may occur in a significant proportion of adults who experienced child sexual abuse.¹⁸ Moreover, respected clinicians note that corroborative evidence supports many recently recovered memories.¹⁹

While amnesia or repression of traumatic memories may be a real and common occurrence, at present scientific uncertainty remains as to when adults might be mistaken in their memories of actual childhood events. Legal actions based solely on such forgotten-then-recovered memories threaten the integrity of the legal system by relying on evidence the veracity of which cannot be adequately assessed. As one expert recently stated:

...when we move from the privacy of the therapy session, in which the client's reality may be the only reality that is important, into the courtroom, in which there can be but a single reality, then we as citizens in a democratic society are entitled to more solid evidence.²⁰

Just as importantly, legal actions based on such evidence may be one fac-

tor contributing to the backlash movement in the child sexual abuse field. One researcher notes that "uncritical acceptance of all allegations" strengthens disbelief about genuine cases of child abuse.²¹ Indeed, society was not able to acknowledge the widespread presence of child sexual abuse until the past 15 years, and there is danger that controversies such as the repressed memory debate may jeopardize the ability to address this serious problem.

Conclusion

Although statutes of limitations traditionally set a limit on the time period within which legal actions can be initiated, recognized exceptions to these time periods have been established across different areas of law, including most recently child sexual abuse cases. Child sexual abuse cases frequently cannot be initiated in a timely manner for the reasons noted above and due to no fault of the abuse victim. Nevertheless, due to the current controversy and lack of research in this area, it may be wise for states to refrain from passing new legislation at this time. Instead, it may be better to allow the courts to decide on a case-by-case basis whether the statute of limitations should be tolled or extended depending on the particular circumstances of the case.

If states continue to reform their statutes of limitations in these cases, several recommendations might be made. First, any legal action, criminal or civil, only should be allowed if there is corroborative evidence of the abuse. Second, in civil actions, a higher burden of proof, called "clear and convincing evidence," could be required in lieu of the usual preponderance of evidence standard. Third, as some states have done, legislatures could limit the number of years beyond which an action could not be brought (e.g., five years after the age of majority), rather than permitting actions until the time a person discovers the injury from sexual abuse. Finally, another option is to extend or eliminate the statute of limitations only in criminal child sexual abuse cases, where the burden of proof is higher and there are greater constitutional safeguards.

A more extended discussion of these issues can be found in Josephine Bulkley & Mark Horwitz, *Adults Sexually Abused as Children: Legal Actions and Issues*, 12 *Behav. Sci. & L.* 65 (1994).

Endnotes

- ¹ Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse of Children: A Review and Synthesis of Recent Empirical Studies*, 113 *Psychol. Bull.* 164 (1993).
- ² Lucy Berliner, American Bar Association, *Nature and Dynamics of Child Sexual Abuse*, in *A Judicial Primer on Child Sexual Abuse* 1 (J. Bulkley & C. Sandt eds., 1994).
- ³ See *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988).
- ⁴ See *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Ct. App. 1990).
- ⁵ See *Iyson v. Tyson*, 727 P.2d 226 (Wash. 1986).
- ⁶ *John R. v. Oakland Unified Sch. Dist.*, 24 Cal. Rptr. 319 (Ct. App. 1987).
- ⁷ See NOW Legal Defense and Education Fund, *Legislative Reform of Statutes of Limitations for Civil Incest and Child Sexual Abuse Cases* (1992).

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clarity and sense of control by securing a copy of her medical records and discussing them with someone who can answer her questions about why certain things occurred. Her feelings of failure may be diminished if you help her re-frame her experience so that she sees that she did the best she could under difficult circumstances.

It is better not to become too "political" about the mother's experience until (if ever) she is ready to hear it. Some of the mothers with whom I have spoken have told me about well-meaning professionals who rail against unnecessary medical interventions or uncaring physicians. These women felt worse, not better, after hearing such criticisms.

Finally, refer the mother to organizations that can help (see box). Also encourage her involvement in activities with other new and/or more experienced mothers. As she becomes more confident, she may be better able to face the challenges of parenting an infant—no matter how difficult her start.

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HELPFUL ORGANIZATIONS FOR NEW MOTHERS

C/SEC (Cesarean/Support, Education, Concern)

Provides information and support for those who have had Cesarean sections, and referrals to local support groups. They also have information on c-section recovery, Cesarean prevention, and vaginal birth after Cesarean.

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⁸ Id.

⁹ Id.

¹⁰ 727 P.2d 226 (Wash. 1986).

¹¹ *Walstrom v. State*, 752 P.2d 225 (Nev. 1988).

¹² See National Center for the Prosecution of Child Abuse, Summary of Legislation Extending or Removing the Statutes of Limitation for Offenses Against Children (1992).

¹³ Id.

¹⁴ Id.

¹⁵ See, e.g., Keith Russell Ablow, "Recovered Memories: Fact or Fantasy," Wash. Post, June 22, 1993, (Health) at 7; Carol Tavis, "Beware the Incest-Survivor Machine," N.Y. Times Book Review, Jan. 3, 1993, at 1; Lawrence Wright, "Remembering Satan-Part I," The New Yorker, May 17, 1993, at 60; Lawrence Wright, "Remembering Satan-Part II," The New Yorker, May 24, 1993, at 54.

¹⁶ John Briere, *Studying Delayed Memories of Childhood Sexual Abuse*, The APSAC Advisor (American Professional Society on the Abuse of Children, Chicago, IL), Summer, 1992, at 17; Roland C. Summit, *Misplaced Attention to Delayed Memory*, The APSAC Advisor (American Professional Society on the Abuse of Children, Chicago, IL), Summer, 1992, at 21; Elizabeth Loftus, *The Reality of Repressed Memories*, 48 Am Psychol. 518 (1993).

See also Sandra G. Boodman, "At 28, Kathy O'Connor of Arlington Says She Remembered That Her Father Raped Her. She Sued Him and Lost. Are Delayed Memories Like Hers True or False?" Wash. Post, April 12, 1994 (Health) at 12; John Taylor, *The Lost Daughter*, Esquire, May 1994, at 76.

¹⁷ See, e.g., Jane Gross, "Suit Asks, Does 'Memory Therapy' Heal or Harm?" N.Y. Times, Apr. 8, 1994, at A1.

¹⁸ John Briere & Jon Conte, *Self-reported Amnesia for Abuse in Adults Molested as Children*, 6 J. Traumatic Stress 21 (1993); Judith L. Herman & E. Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 Psychoanalytic Psychol. 1 (1987); Elizabeth Loftus, et al., *Memories of Childhood Sexual Abuse. Remembering and Repressing*, Psychol. Women Quar. (in press); Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, J. Consul. & Clin. Psychol. (in press).

¹⁹ See, e.g., Herman & Schatzow, *supra* note 19.

²⁰ Loftus, *supra* note at 534.

²¹ Id.

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